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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-453

NATIONAL ALLIANCE OF POSTAL AND FEDERAL EMPLOYEES, PETITIONER

v.

BENJAMIN F. BAILAR, POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 514 F. 2d 189. The opinion of the district court (Pet. App. B) is reported at 369 F. Supp. 747.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1975. On September 9, 1975, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including September 22, 1975

(Pet. App. C), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(D).

QUESTIONS PRESENTED

1. Whether, in the circumstances here, the United States Postal Service could properly continue to recognize and bargain with the national craft unions that had been selected as the exclusive bargaining representatives of appropriate units of postal employees in elections conducted under the procedure that governed labor-management relations in the Postal Service prior to the Postal Reorganization Act of 1970.

2. Whether the district court properly declined to review the action of the General Counsel of the National Labor Relations Board in refusing to issue a complaint on charges alleging that such action by the Postal Service constituted an unfair labor practice under the National Labor Relations Act.

STATUTES INVOLVED

The relevant provisions of the Postal Reorganization Act, 84 Stat. 719, 39 U.S.C. 101, *et seq.* (hereafter "PRA"), and the National Labor Relations Act, 61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.* (hereafter "NLRA"), are set forth at Pet. App. D.

STATEMENT

A. BACKGROUND

On August 12, 1970, Congress enacted the PRA, creating the United States Postal Service "as an in-

dependent establishment of the executive branch of the Government of the United States" (39 U.S.C. 201). Chapter 12 of the PRA (39 U.S.C. 1201–1209), which became effective July 1, 1971, made the NLRA generally applicable to, and gave the NLRB jurisdiction over, labor-management relations in the Postal Service.[1] Section 10(a) of the PRA (84 Stat. 784), the "transitional section," provided:

> As soon as practicable after the enactment of this Act, the Postmaster General and the labor organizations which as of the effective date of this section hold national exclusive recognition rights granted by the Post Office Department, shall negotiate an agreement or agreements covering wages, hours, and working conditions of the employees represented by such labor organizations. * * *

Pursuant to this Section, the Postmaster General and the national craft unions holding national exclusive recognition status (n. 1, *supra*) entered into a national agreement on July 20, 1971, for a two-year period (Pet. App. 41–42).

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[1] Prior to July 1, 1971, collective bargaining between the Post Office Department and labor unions representing postal employees was governed by Executive Order 10988, 27 Fed. Reg. 551. Section 6(a) thereof accorded exclusive recognition to a labor organization designated or selected by a majority of the employees in an appropriate unit. In elections held in 1962 and 1963, a majority of the employees voting in seven national craft units selected seven national craft unions, including respondent National Association of Letter Carriers ("NALC"). The Department of Labor certified these craft unions as national exclusive representatives for postal employees in those units. Thereafter, the Post Office Department and the seven craft unions entered into successive collective bargaining agreements. (Pet. App. 41, n. 2.)

Meanwhile, in October 1970, shortly after enactment of the PRA, petitioner National Alliance and two other unions brought an action in the district court to enjoin enforcement of Section 10(a), the transitional section. They complained that it was "class" or "special" legislation that denied them and their members equal protection of the laws guaranteed by the Fifth Amendment. A three-judge court was convened, and on March 15, 1972, it upheld the constitutionality of Section 10(a). *National Postal Union* v. *Blount,* 341 F. Supp. 370 (D. D.C.). This Court summarily affirmed *sub nom. National Association of Letter Carriers* v. *National Alliance of Postal & Federal Employees,* 409 U.S. 808. The district court defined the transitional period envisaged by Section 10(a) as extending until (341 F. Supp. at 372, n. 4):

> the establishment of bargaining units and elections of representatives under the provisions of the National Labor Relations Act, as provided in Chapter 12 of the [PRA], or such earlier action as might be taken by the Labor Board defining rights and obligations of the Postmaster General, the labor organizations representing postal employees, and their members.

In 1971, while the three-judge court was considering the *Blount* case, several National Alliance locals and other unions filed representation petitions with the NLRB, seeking elections in various proposed units of

employees.[2] In February 1974, the Board, after an evidentiary hearing and oral argument, dismissed the petitions. *United States Postal Service,* 208 NLRB 948. The Board stated (*id.* at 954):

> As to the six petitions now before us, it is our considered judgment that when factors unique to the Postal Service are commingled with the other factors relating to community of interest, such as geographic proximity, employee interchange, and distinctiveness of job classifications, all of the petitioned-for units fail to evidence the community of interest which we require of appropriate units. However, our decision herein is not to be construed as an administrative fiat to adhere to the preexisting national craft units which Congress, under the PRA, continued during the transition period or as precluding a finding of unit appropriateness for a unit less than national in scope. Rather, we only hold that none of the instant Petitioners seeks to represent employees in an appropriate unit. Our concern is to encourage meaningful collective bargaining. And on the present record we find and conclude * * * that the petitioned-for units are inappropriate for achieving that goal.

[2] In general, the National Alliance requested that the NLRB establish a number of "industrial units" (encompassing all employees in designated facilities or locations), as opposed to the existing craft units (encompassing all employees performing a specific type of work).

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B. THE INSTANT CASE

As the expiration date of the 1971 national agreement approached, the Postal Service and the national craft unions commenced negotiations, and ultimately they entered into a new two-year national agreement—running from July 21, 1973 to July 21, 1975 (Pet. App. 42–43). The National Alliance then filed charges with the NLRB's Regional Office, alleging that the Postal Service violated Section 8(a)(2) and (5) of the NLRA, 29 U.S.C. 158(a)(2) and (5), by negotiating and executing that agreement during the pendency of a question concerning representation raised by the 1971 petitions and additional petitions that had been filed by the National Alliance in 1973,[3] and by entering into another agreement with the national craft unions, contrary to Sections 1202 and 1203 of the PRA,[4] when they had not been selected by employees in NLRB conducted elections (Pet. App. 44–45).

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[3] Processing of these petitions was deferred by the NLRB's Regional Directors pending the NLRB's ruling on the 1971 petitions. They were dismissed after the NLRB decision of February 1974. (Pet. App. 44.)

[4] Section 1202 of the PRA provides:

"The National Labor Relations Board shall decide in each case the unit appropriate for collective bargaining in the Postal Service. * * *"

Section 1203 provides in relevant part:

"(a) The Postal Service shall accord exclusive recognition to a labor organization when the organization has been selected by a majority of the employees in an appropriate unit as their representative.

* * * * *

"(c) When a petition has been filed, in accordance with such

In October 1973, the Regional Director dismissed the charges except for the one concerning action by the Postal Service during pendency of the petitions. The latter was held in abeyance awaiting the final disposition of the 1971 and 1973 petitions.[5] National Alliance appealed the partial dismissal to the NLRB General Counsel, who sustained the Regional Director. (Pet. App. 45.)

On December 5, 1973, National Alliance and three of its members instituted the instant suit in the district court, seeking, *inter alia*, a declaratory judgment that Sections 10(a), 1202, and 1203 of the PRA, as applied by the Postmaster General to confer exclusive representative status on the national craft unions beyond the expiration of the transitional bargaining period, denied plaintiffs the equal protection of the law guaranteed by the Constitution; that such action by the Postmaster General constituted an unfair labor practice under Section 8(a)(2) of the NLRA; and

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regulations as may be prescribed by the National Labor Relations Board—

* * * * *

"the National Labor Relations Board shall investigate such petition and, if it has reasonable cause to believe that a question of representation exists, shall provide for an appropriate hearing upon due notice. * * * If the National Labor Relations Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

[5] Following dismissal of these petitions, the Regional Director dismissed the remaining charge (Pet. App. 45, n. 8).

that the Postmaster General further violated Section 8(a)(2) by negotiating contracts with those unions during the pendency of representation petitions filed with the NLRB (Pet. App. 50–51).

The district court concluded that plaintiffs' constitutional challenge was without merit. It pointed out that the constitutionality of the grant of exclusive representation to the national craft unions by Section 10(a) of the PRA had been upheld in the *Blount* case. The court further found that Chapter 12 of the PRA does not require the NLRB to hold an election before the Postal Service could accord exclusive recognition to a majority representative pursuant to Section 1203(a) of that Act; that the Postal Service thus acted within its authority in continuing to recognize the incumbent national craft unions; and that, since the petition procedures specified in Section 1203(c) afforded outside unions an *opportunity* to dislodge the incumbent craft unions, provided they petitioned for appropriate units at an appropriate time, this was sufficient to redeem "the Congressionally mandated transitional discrimination against outside unions in § 10(a) of the Act" (Pet. App. 64–66).

The district court also held that it lacked jurisdiction to consider the plaintiffs' claim that continued recognition of the craft unions by the Postal Service constituted an unfair labor practice under Section 8(a)(2) of the NLRA. The NLRB's General Counsel had decided not to issue a complaint on this charge,

and that was a final, unreviewable decision. (Pet. App. 59, 66–67.)[6]

The court of appeals affirmed the judgment of the district court (Pet. App. 39–49).

ARGUMENT

1. Petitioner's basic contention is that, although Section 10(a) of the PRA permitted the Postal Service to recognize the national craft unions as exclusive representatives during the "transitional period," the statute does not, and indeed could not constitutionally, permit continued recognition of those unions beyond the expiration of the interim contract without NLRB-conducted elections.

It is settled that a "Board election is not the only method by which an employer may satisfy itself as to the union's majority status" (*United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 72, n. 8); "a union [does] not have to be certified as the winner of a Board election to invoke a bargaining obligation"

[6] For similar reasons, the district court ruled that it was without jurisdiction to review plaintiffs' claim that the Postal Service violated the NLRA by negotiating a new agreement with the craft unions during the pendency of the representation petitions (Pet. App. 59–60). However, since the charges on that matter had been held in abeyance by the NLRB Regional Director (*supra*, p. 6), the district court dismissed this portion of the complaint, without prejudice to renewing the claim "at an appropriate future time and in the proper forum" (Pet. App. 53). As noted (n. 5, *supra*), the Regional Director subsequently dismissed that charge, and no appeal was taken to the NLRB General Counsel.

(*National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 597). It is also settled that a union which has legitimately achieved representative status—whether through an election or by voluntary recognition—is presumed to maintain majority employee support in the absence of unusual circumstances. While that presumption is rebuttable after one year, the burden is on the employer to show an objectively reasonable basis for a good faith doubt of the union's continued majority. See *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 98, 103–104; *Terrell Machine Co.* v. *National Labor Relations Board*, 427 F. 2d 1088, 1090 (C.A. 4), certiorari denied, 398 U.S. 929; *Bally Case and Cooler, Inc.* v. *National Labor Relations Board*, 416 F. 2d 902, 905 (C.A. 6), certiorari denied, 399 U.S. 910.

Contrary to petitioner's contention (Pet. 20–23), the fact that Section 1203(a) of the PRA authorizes the Postmaster General to accord exclusive recognition only to labor organizations that have been "selected," whereas Section 9(a) of the NLRA, 29 U.S.C. 159(a), uses the phrase "designated or selected," does not evidence an intention by Congress to depart from these established principles insofar as the Postal Service is concerned. Indeed, Congress left it to the Board to determine representation questions, after the transitional period ended, pursuant to the principles and procedures that it would normally apply. Section 1203(c) of the PRA, like Section 9(c) of the NLRA, 29 U.S.C. 159(c), provides for the holding of an election only when a

petition has been filed and the NLRB has determined that it raises "a question of representation." The appropriateness of the unit sought is a basic factor in determining whether a petition raises a question of representation. See 29 C.F.R. 101.18. Moreover, Senator McGee, Chairman of the Senate Post Office and Civil Service Committee, described the bill approved by the House-Senate Conference Committee, as affording "postal unions which are not craft [unions] * * * the opportunity, *subject to recognition procedures by the National Labor Relations Board,* to compete for recognition." 116 Cong. Rec. 26953 (1970) (emphasis added). Finally, Section 1203(c)(1)(B) of the PRA specifically contemplates that the Postal Service may recognize as the exclusive representative of postal workers a labor organization that has not been certified in an election, for it refers to the "labor organization which has been certified *or is being currently recognized* by the Postal Service" (emphasis added).

Nor is there substance to petitioner's contention (Pet. 31–36) that to construe the PRA to permit continued recognition of the incumbent craft unions without requiring that their representative status be tested in an NLRB-conducted election unconstitutionally deprives postal employees of their right to choose their own bargaining agents. Even on the assumption that the right to select a bargaining agent is a fundamental right, the Constitution guarantees no specific procedure for vindicating that right. See *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.,* 169 F. 2d 571, 577 (C.A. 6), vacated and re-

manded on other grounds, 332 U.S. 840; *Fay* v. *Douds*, 172 F. 2d 720, 724 (C.A. 2). Congress, in the NLRA, established a procedure for doing so, which, *inter alia*, provides for a representation election only where a petition is filed that seeks an election in a unit that the Board finds appropriate for collective bargaining purposes.[7] Petitioner was afforded an opportunity to, and did, avail itself of this election procedure, which Congress has extended to the Postal Service. The fact that it sought units which, under settled principles, were found to be inappropriate does not establish a deprivation of a constitutional right.

2. Contrary to petitioner's contention (Pet. 37), the courts below did not err in finding that they lacked jurisdiction over the General Counsel's determination not to issue a complaint upon petitioner's unfair labor practice charges. It has been long settled that Section 3(d) of the NLRA, 29 U.S.C. 153(d), which gives the General Counsel "final authority" over the processing of unfair labor practice charges, precludes judicial review of his action in refusing to issue a complaint on a charge—irrespective of whether that action turned on a factual or a legal issue. See, *e.g.*, *Vaca* v. *Sipes*, 386 U.S. 171, 182; *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138; *Braden* v. *Herman*, 468 F. 2d 592, 593 (C.A. 8), certiorari denied, 411 U.S. 916; *Saez* v. *Goslee*, 463 F.2d 214, 215 (C.A. 1), certiorari denied, 409 U.S. 1024.

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[7] In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, this Court sustained the constitutionality of the NLRA and its procedures.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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